

STATE OF MICHIGAN  
COURT OF APPEALS

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JAMIL AKHTAR,

Plaintiff-Appellant/Cross-Appellee,

v

CHARTER COUNTY OF WAYNE,

Defendant-Appellee/Cross-  
Appellant,

and

WAYNE COUNTY EMPLOYEE RETIREMENT  
SYSTEM and RONALD YEE,

Defendants-Appellees.

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UNPUBLISHED  
February 11, 2003

No. 233879  
Wayne Circuit Court  
LC No. 00-033102-CZ

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying his motion for summary disposition and dismissing the case. Defendant Charter County of Wayne (“County”) cross-appeals. We affirm.

We first address County’s cross-appeal issues. First, County argues that plaintiff lacked standing to raise the issue of the CEO designee’s residency because that residency did not injure plaintiff. However, plaintiff brought suit because he was prohibited from seeking election to the retirement commission, a cause of action in which plaintiff had a real interest and a traceable injury-in-fact. *Lee v Macomb Co Bd of Comm’rs*, 464 Mich 726, 738-740; 629 NW2d 900 (2001). Plaintiff only used the CEO designee’s residency as support for his equal protection claim. Therefore, standing was not a bar to plaintiff discussing the CEO designee’s residency.

Second, County argues that plaintiff lacked standing to raise any of his issues because he had no legally protected interest in running for office. However, plaintiff is specifically invoking his constitutional right to equal protection under the laws, not a fundamental right to run for office. Whether candidacy is a fundamental right only determines the level of scrutiny. See *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). Standing does not depend on the substantive merits of a plaintiff’s case. *Detroit Fire Fighters Ass’n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). Plaintiff did not lack standing.

Third, County argues that plaintiff failed to properly preserve his claims regarding the statutory violation, deprivation of a vested right, and the constitutionality of the ordinance. Contrary to defendant's assertions on appeal, the trial court did address each issue substantively, despite the fact that plaintiff's complaint alleged only that the charter provision violated the constitution. If the court had granted summary disposition in favor of defendants and not addressed the other issues raised in plaintiff's motion for summary disposition, it would have been obligated to allow plaintiff an opportunity to amend his complaint. MCR 2.116(I)(5). However, by addressing the issues, the court exercised judicial efficiency and implicitly determined that an amendment would have been futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). Therefore, the court's review was warranted and the issues are properly before us on appeal.

We review a court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the trial court did not specify the grounds for dismissal, the court's analysis indicates that it intended to grant summary disposition for defendants under MCR 2.116(C)(10) (no genuine issue of material fact). In making this determination, the court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Plaintiff first argues that the residency requirement of the charter provision violates his equal protection rights. US Const, Am XIV; Const 1963, art 1, § 2. Although Michigan has not determined the level of review for laws requiring residency in order to seek elective office,<sup>1</sup> we believe that this situation is analogous to laws which require residency during employment. Such laws are subject to the rational basis test. *Michigan State Employees Ass'n v Civil Service Comm*, 91 Mich App 135, 141; 283 NW2d 672 (1979); see also *Williams v Detroit Civil Service Comm*, 383 Mich 507, 513, 517-518; 176 NW2d 593 (1970) (finding constitutional residency requirements for all civil service employees). Plaintiff's arguments that a different test applies are unpersuasive.<sup>2</sup>

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<sup>1</sup> We note that we have enforced such candidate residency requirements without questioning their constitutionality. *Gallagher v Keefe*, 232 Mich App 363, 374; 591 NW2d 297 (1998); *Okros v Myslakowski*, 67 Mich App 397, 401-402; 241 NW2d 223 (1976).

<sup>2</sup> Strict scrutiny applies when the law classifies based on "suspect" factors or when it interferes with a fundamental right. *Crego, supra* at 259. However, residency is not considered a suspect classification, *Id.*, and neither is there a recognized fundamental right to candidacy, *Carver v Dennis*, 104 F3d 847, 850-851 (CA 6, 1997). Although the right to travel intrastate is a fundamental right, *Musto v Redford Twp*, 137 Mich App 30, 34; 357 NW2d 791 (1984), that right is not affected by laws requiring residency *during* employment because they are distinguishable from durational residency laws which require residency for a period of time *before* applying for or obtaining a benefit. Regardless, durational residency requirements for candidates for elective office have been upheld by the United States Supreme Court and the Sixth Circuit. *Sununu v Stark*, 420 US 958, 958; 95 S Ct 1346; 43 L Ed2d 435 (1975) (seven-year residency requirement for state senator constitutional); *Biel v City of Akron*, 660 F2d 166, 169 (CA 6, 1981) (one-year durational residency requirement for city ward commission position constitutional).

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Therefore, the residency requirement in the charter provision need only be rationally related to a legitimate government purpose. *Crego, supra* at 259. The classification is presumed constitutional and will be upheld if it is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. *Id.* at 259-260. In *Muskegon Area Rental Ass'n v Muskegon*, 465 Mich 456, 465; 636 NW2d 751 (2001), our Supreme Court clarified that there is no equal protection violation merely because two classifications are treated differently; to fail an equal protection analysis, there must be no rational basis for the different treatment.

In this case, there is a rational basis for allowing only county residents to seek election to the retirement commission. Residents are, in general, more likely to attend meetings and invest in their own county. Further, even if the requirement is not imposed on the chief executive officer's designee, that different treatment is also rational because the designee is likely to attend and invest in the county regardless of residency. We conclude that the residency requirement does not violate plaintiff's equal protection rights.

Plaintiff also asserts that the residency requirement violates his due process rights. No person may be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. Because we determined above that the charter provision does not affect a fundamental right, the rational basis test applies. *People v Sleet*, 193 Mich App 604, 605-606; 484 NW2d 757 (1992). Residency requirements do not, in general, violate substantive due process. See *Williams, supra* at 517. As discussed above, the requirement in the present case is rationally related to a legitimate government purpose, and, therefore, is not unconstitutional on its face.

However, residency requirements can violate due process if they are applied unreasonably. *State, County & Municipal Employees Local 339, AFL-CIO v Highland Park*, 363 Mich 79, 86-87; 108 NW2d 898 (1961); *Detroit Police Lieutenants & Sergeants Ass'n v Detroit*, 56 Mich App 617, 621; 224 NW2d 728 (1974). Plaintiff compares his situation to that of the employees in *Detroit Police Lieutenants & Sergeants Ass'n, supra*, because he too would be required to uproot. However, this Court determined that the residency requirement in that case was unreasonably applied because the employees were given express written waivers. *Id.* In the instant action, plaintiff does not claim an express waiver of the residency requirement. He is in no different position than any other nonresident seeking election to the commission. We conclude that the requirement is not unreasonable as applied to plaintiff; therefore, it does not violate his due process rights.

Plaintiff next alleges a violation of MCL 15.602, which prohibits residency requirements for public employment but exempts public officials. Plaintiff's claim fails because the commission position constitutes an elective office under the test most recently cited in *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999). For a position to constitute a public office,

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Intermediate scrutiny does not apply because residency is not a somewhat suspect classification. *Crego, supra* at 260. Nor does the more stringent rational basis test set forth in *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 669-671; 232 NW2d 636 (1975), apply because the residency requirement is not a discrete exception to a general rule.

(1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; [and] (5) it must have some permanency and continuity, and not be only temporary or occasional. [*Id.* (internal citations omitted).]

In this case, commission members are not prevented from being public officials merely because they cannot act alone, but rather act as a body. The commission was created by county charter and was delegated the authority to act for the benefit of all retirement system members. Further, the commission itself is permanent regardless whether the members change.

Finally, plaintiff argues that he was deprived of a vested right because the requirement substantially impaired his right to seek office. However, there can be no impairment if there was no vested right. *Henry L Meyers Moving & Storage v Michigan Life & Health Ins Guaranty Ass'n*, 222 Mich App 675, 692; 566 NW2d 632 (1997). A vested right is defined as a fixed right not dependent on a future contingency, or, alternatively, as a right of which the individual could not be deprived without injustice. *Id.* at 691.

There is no vested right to public office. *Molinaro v Driver*, 364 Mich 341, 350; 111 NW2d 50 (1961). Further, there is no vested right to employment, *Detroit Police Lieutenants & Sergeants Ass'n*, *supra* at 620, and plaintiff fails to cite any specific contractual provision promising commission eligibility. His right to seek election was implicitly dependent on the commission's future composition and eligibility requirements. Therefore, plaintiff had no vested right.

In conclusion, we hold that the residency requirement in the charter provision does not violate plaintiff's equal protection or due process rights, the statutory limitation on residency requirements does not apply to the retirement commission position, and plaintiff was not deprived of a vested right. Accordingly, we hold that the trial court properly dismissed all of plaintiff's claims.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Kurtis T. Wilder  
/s/ Bill Schuette